OVERVIEW: The U.S. Supreme Court and the 8th Amendment Part 1

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"DEATH IS DIFFERENT"

-- *Woodson v. North Carolina*,
428 U.S. 280 (1976)

THE CYCLE OF THE U.S. SUPREME COURT'S MODERN 8TH AMENDMENT JURISPRUDENCE

A Little History …

- ✓ *McGautha v. California*, 402 U.S. 183 (1971)
- ✓ *Furman v. Georgia*, 408 U.S. 238 (1972)
- ✓ *Gregg v. Georgia*, 428 U.S. 153 (1976) (with *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. N. Carolina*, 428 U.S. 280 (1976); & *Roberts v. Louisiana*, 428 U.S. 325 (1976))

McGautha v. California: Justice Harlan

McGautha v. California: Justice Brennan

"Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson [of] history …. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."

McGautha v. California: Justice Brennan

"But discretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds. ... [E]ven if a State's notion of wise capital sentencing policy is such that the policy cannot be implemented through a formula capable of mechanical application, ... there is no reason that it should not give some guidance to those called upon to render decision ... "

Furman v. Georgia (1972)

- ✓ Nine separate opinions; longest single decision in U.S. Supreme Court's history
- ✓ ONLY Justices Brennan and Marshall would have held death penalty to be unconstitutional under all circumstances
- ✓ By 5-4, death penalty unconstitutional as administered under current statutes
- ✓ 2/3 of the states adopted new statutes

Gregg v. Georgia (1976)

- ✓ North Carolina and Louisiana statutes ruled unconstitutional because they gave the sentencer no discretion
- ✓ "Guided discretion" statutes of Georgia and Florida, based on aggravating and mitigating circumstances, held to be OK
- ✓ "Special questions" statute of Texas also held to be OK (but later became a problem...)

8TH AMEND. PROCEDURAL "SUPER DUE PROCESS"

- ✓ *Lockett v. Ohio* (1978)
- ✓ *Godfrey v. Georgia* (1979)
- ✓ U.S. Supreme Court refuses to decide whether death penalty is unconstitutional as applied to the facts of particular cases
- ✓ Instead, Court finds death penalty unconstitutional because of procedures used at trial and/or sentencing stage

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8TH AMENDMENT "HARMLESS ERROR"

- ✓ *Zant v. Stephens* (1983)
- ✓ *Barclay v. Florida* (1983)
- ✓ U.S. Supreme Court tries to develop special "harmless error" doctrine for capital sentencing
- ✓ Fails because it's impossible to tell if errors are "harmless"

PROCEDURAL LIMITS ON FEDERAL *HABEAS CORPUS*

- ✓ *Wainwright v. Sykes* (1977)
- ✓ *Rose v. Lundy* (1982)
- ✓ *Kuhlmann v. Wilson* (1986)
- ✓ *Teague v. Lane* (1989)
- ✓ *Butler v. McKellar* (1990)
- ✓ *McCleskey v. Zant* (1991)
- ✓ *Brecht v. Abrahamson* (1993)

"FUNDAMENTAL MISCARRIAGE OF JUSTICE" EXCEPTION TO PROCEDURAL *HABEAS* LIMITS

- ✓ *Murray v. Carrier* (1986)
- ✓ *Kuhlmann v. Wilson* (1986)
- ✓ *Smith v. Murray* (1986)
- ✓ *McCleskey v. Zant* (1991)
- ✓ *Coleman v. Thompson* (1991)
- ✓ *Sawyer v. Whitley* (1992)
- ✓ *Schlup v. Delo* (1995)

"NAKED INNOCENCE" CLAIM

Justice O'Connor in *Herrera v. Collins* (1993): "[T]he Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence. That difficult question remains open. If the Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all."

INNOCENCE AND INEFFECTIVE ASSISTANCE OF COUNSEL (I.A.C.)

Strickland v. Washington **(1984) – Ineffective assistance of counsel claim requires defendant to show (1) deficient performance by the defense attorney, and (2) prejudice (*i.e.,* "reasonable probability" of a different outcome, sufficient to undermine confidence).**

INNOCENCE AND BRADY DOCTRINE

Brady v. Maryland **(1963) – Prosecution has due process obligation to disclose "material" exculpatory evidence to the defendant (*i.e.,* evidence that would have created a "reasonable probability" of a different outcome, sufficient to undermine confidence).**

DE NOVO REVIEW FOR MIXED ISSUES OF FACT AND LAW

Wright v. West **(1992) - Even though *habeas* courts must defer to state courts on issues of fact, and also must defer to all "reasonable" state-court rulings of law (under *Teague v. Lane*), *habeas* courts nevertheless should exercise *de novo* review of "mixed" issues of fact and law.**

LEGISLATIVE *HABEAS* REFORM: THE AEDPA (1996)

- ✓ One-year time limit
- ✓ More stringent exhaustion requirement
- ✓ New standard of review: "contrary to, or involv[ing] an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" (effectively overruling *Wright v. West*)
- ✓ Strict limits on successive petitions
- ✓ Special "opt-in" rules for capital cases, but only if state commits to provide qualified counsel for state post-conviction proceedings

THE SUPREME COURT RESPONDS TO AEDPA

- ✓ *Felker v. Turpin* (1996)
- ✓ *Calderon v. Thompson* (1998)
- ✓ *Stewart v. Martinez-Villareal* (1998)
- ✓ *M. Williams v. Taylor* (2000)
- ✓ *T. Williams v. Taylor* (2000)
- ✓ *Edwards v. Carpenter* (2000)

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AND THE BEAT GOES ON…

- ✓*House v. Bell* (2006) – 5-3 decision
- ✓Justice Kennedy writes majority opinion (with Stevens, Souter, Breyer, Ginsburg)
- ✓ISSUE: Did House meet the *Schlup v. Delo* standard of "actual innocence" so as to warrant review of his procedurally defaulted federal *habeas* claims?

House v. Bell (2006):

HOLDING: "This is not a case of conclusive exoneration. Some aspects of the State's evidence … still support an inference of guilt. Yet the central forensic proof connecting House to the crime – the blood and the semen – has been called into question, and House has put forward substantial evidence pointing to a different suspect.

House v. Bell (2006):

Accordingly, and although the issue is close, we conclude that this is the rare case where – had the jury heard all the conflicting testimony – it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt."

House v. Bell (2006):

- ✓ "House urges the Court to answer the question left open in *Herrera* and hold not only that freestanding innocence claims are possible but also that he has established one...."
- ✓ "We decline to resolve this issue. We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it."

House v. Bell (2006):

"*Herrera* requires more convincing proof of innocence than *Schlup*. It follows, given the closeness of the *Schlup* question here, that House's showing falls short of the threshold implied in *Herrera*."

House v. Bell (2006):

Chief Justice Roberts, dissenting (joined by Justices Scalia and Thomas) – "House must present such compelling evidence of innocence that it becomes more likely than not that no single juror, acting reasonably, would vote to convict him.... I ... find it more likely than not that [even] in light of this new evidence, at least one juror, acting reasonably, would vote to convict House."

House v. Bell (2006):

Death Row Prison Guard, speaking to a Prison Minister:

"The Supreme Court has said any reasonable juror would find this man innocent, right? Then why is he still here?"

Recent Developments

- ✓ ***District Attorney's Office v. Osborne*** **(2009) – Alaska's statutory procedure for post-trial access to DNA evidence does not violate due process.**
- ✓ ***Skinner v. Switzer*** **(3/7/2011) – Claims for DNA access may be filed under §1983.**
- ✓ ***Troy Anthony Davis*** **(3/28/2011) – S.Ct. orders evidentiary hearing in district court, on "original writ," but then declines review.**

THE 8TH AMENDMENT AS A SOURCE OF SUBSTANTIVE LAW

- ✓ ***Coker v. Georgia*** **(1977)**
- ✓ ***Enmund v. Florida*** **(1982); *Tison v. Arizona*** **(1987)**
- ✓ ***Thompson v. Oklahoma*** **(1988); *Stanford v. Kentucky*** **(1989); *Roper v. Simmons*** **(2005)**
- ✓ ***Penry v. Lynaugh*** **(1989); *Atkins v. Virginia*** **(2002)**
- ✓ ***Kennedy v. Louisiana*** **(2008)**
- ✓ ***Baze v. Rees*** **(2008)**

THE 8TH AMENDMENT AS A SOURCE OF PROCEDURAL LAW

- ✓ The basic requirement of "guided discretion"
  - *Furman v. Georgia* (1972)
  - *Gregg v. Georgia* (1976)
  - *McCleskey v. Kemp* (1987)
- ✓ Regulation of sentencing information
  - *Godfrey v. Georgia* (1980)
  - *Payne v. Tennessee* (1991)
  - *Lockett v. Ohio* (1978)
  - *Oregon v. Guzek* (2006)
- ✓ Personal responsibility of capital decision-maker
  - *Caldwell v. Mississippi* (1985)

OTHER CONSTITUTIONAL SOURCES

- ✓ Compelled Self-Incrimination (5th A.)
- ✓ Right to Counsel (6th A.)
- ✓ Right to Jury Trial (6th A.)
- ✓ Impartial Jury/Fair Cross-Section (6th A.)
- ✓ Double Jeopardy (6th A.)
- ✓ Due Process (14th A.)
- ✓ Equal Protection (14th A.)
- ✓ Supremacy Clause

INHERENT TENSION:

RULES (*i.e.,* the need for rationality, predictability, and due process in capital sentencing)

vs.

DISCRETION (*i.e.,* the need for individualized consideration and case-by-case justice)

Justice Scalia in *Walton v. Arizona* (1990):

"Today a petitioner before this Court says that a state sentencing court

(1) had unconstitutionally *broad* discretion to sentence him to death instead of imprisonment, *and*

(2) had unconstitutionally *narrow* discretion to sentence him to imprisonment instead of death."

Justice Scalia in *Walton v. Arizona* (1990):

"An observer unacquainted with our death penalty jurisprudence (and in the habit of thinking logically) would probably say these positions cannot both be right. The ultimate choice in capital sentencing, he would point out, is a unitary one – the choice between death and imprisonment. One cannot have discretion whether to select the one yet lack discretion whether to select the other."

Justice Scalia in *Walton v. Arizona* (1990):

"Our imaginary observer would then be surprised to discover that, under this Court's Eighth Amendment jurisprudence of the past 15 years, petitioner would have a strong chance of winning on *both* of these antagonistic claims, simultaneously .... But that just shows that our jurisprudence and logic have long since parted ways."

Justice Scalia in *Walton v. Arizona* (1990):

"To acknowledge that 'there perhaps is an inherent tension' between this line of cases and the line stemming from *Furman, ...* is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing 'twin objectives,' ... is rather like referring to the twin objectives of good and evil. They cannot be reconciled."

Justice Blackmun in *Callins v. Collins* (1994)

"On their face, [the] goals of individual fairness, reasonable consistency, and absence of error appear to be attainable.... Yet, in the death penalty area, this Court, in my view, has engaged in a futile effort to balance these constitutional demands. From this day forward, I no longer shall tinker with the machinery of death."

Kansas v. Marsh (2006):

Justice Souter, dissenting (joined by Stevens, Breyer, Ginsburg) – "[T]he period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences ... [when] the case for death is 'doubtful.'... We are thus in a period of new empirical argument about how 'death is different....'

Kansas v. Marsh (2006):

Justice Thomas – "[T]he logical consequence of the dissent's argument is that the death penalty can only be just in a system that does not permit error. Because the criminal justice system does not operate perfectly, abolition of the death penalty is the only answer to the moral dilemma the dissent poses. This Court, however, does not sit as a moral authority. Our precedents do not prohibit the States from authorizing the death penalty, even in our imperfect system."

Kansas v. Marsh (2006):

Justice Scalia – "Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum."

Kansas v. Marsh (2006):

Justice Scalia – "This explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to.... The American people have determined that the good to be derived from capital punishment...outweighs the risk of error. It is no proper part of the business of this Court...to second-guess that judgment...."

CONSTITUTIONAL DISCRETION IN THE TRIAL COURTS

Three Special Areas in which U.S. S. Ct. Relies Heavily on Lower-Court Discretion:

- ✓**Ineffective Assistance of Counsel**
- ✓**Brady Doctrine**
- ✓***Batson v. Kentucky***

INEFFECTIVE ASSISTANCE OF COUNSEL – SUPREME COURT

Strickland v. Washington **(DP) (1984)**

- ✓ ***Lockhart v. Fretwell*** **(1993) (DP; failure to raise issue) –**
- ✓ ***Williams v. Taylor*** **(2000) (DP; failure to investigate) +**
- ✓ ***Wiggins v. Smith*** **(2003) (DP; failure to investigate) +**
- ✓ ***Rompilla v. Beard*** **(2005) (DP; failure to investigate) +**
- ✓ ***Smith v. Spisak*** **(2010) (DP; closing argument) –**
- ✓ ***Harrington v. Richter*** **(2011) (LWOP; failure to consult expert before trial) –**
- *** ***Cullen v. Pinholster*** **(2011) – NO rigid IAC rules!!!**
- ✓ ***United States v. Cronic (1984)***
- ✓ ***Bell v. Cone*** **(2002) (DP; failure to investigate) –**

BRADY DOCTRINE – SUPREME COURT

- ✓***Brady v. Maryland*** **(1963)**
- ✓***United States v. Agurs*** **(1976)**
- ✓***United States v. Bagley*** **(1985)**
- ✓***Kyles v. Whitley*** **(1995) +**
- ✓***Strickler v. Greene*** **(1999) -**
- ✓***Banks v. Dretke*** **(2004) +**

BATSON v. KENTUCKY – SUPREME COURT

- ✓ *Miller-El v. Cockrell* (2003) – 5th Circuit should have granted COA on *Batson* issue, largely based on prosecutorial policy manual. +
- ✓ *Miller-El v. Dretke* (2005) – 5th Circuit should have granted *habeas* relief on *Batson* issue. +
- ✓ *Johnson v. California* (2005) – State trial courts generally should move to 2nd *Batson* stage, and inquire about prosecutorial motives. +
- ✓ *Snyder v. Louisiana* (2008) – State trial court's ruling about prosecutor's race-neutral motive reversed. +

THE END

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